

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

ROBERT E. BROWN,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

(CSA 3 180 343)

DOCKET NUMBER  
DE08319110189

DATE: NOV 25 1991

John P. Gamlin, Esquire, John P. DiFalco & Associates,  
P.C., Fort Collins, Colorado, for the appellant.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that dismissed his petition for appeal. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal.

### BACKGROUND

The appellant filed an application with the Office of Personnel Management (OPM) to make a deposit to receive credit for contract service under the Civil Service Retirement System or the Federal Employees' Retirement System. See Initial Appeal File (IAF), Tab 12, Subtab 5. In an initial decision and on reconsideration, OPM rejected his application because it found the application to be untimely filed. See *id.*, Subtabs 4, 2. The appellant then filed a petition for appeal with the Board's Denver Regional Office. See IAF, Tab 1. Subsequently, OPM rescinded its reconsideration decision, found the appellant's application to be timely filed, and filed a motion to dismiss the appeal for lack of jurisdiction. See IAF, Tabs 10, 12. The appellant responded to OPM's motion to dismiss, admitting that the appeal might be moot but objecting to a dismissal for lack of Board jurisdiction. See IAF, Tab 13. Nevertheless, the administrative judge dismissed the petition for appeal for lack of Board jurisdiction over the appeal and for mootness. See IAF, Tab 14.

The appellant has filed a timely petition for review in which he asserts that the administrative judge erred by dismissing the petition for appeal for lack of Board jurisdiction. Rather, he contends that the petition for appeal should have been dismissed on the grounds of mootness alone. He further asserts that any request for attorney fees will be denied if the Board affirms the dismissal for lack of

jurisdiction. See Petition For Review File, Tab 1. OPM has not responded to the petition for review.

#### ANALYSIS

The Board has jurisdiction to hear appeals of final OPM decisions under 5 U.S.C. § 8347(d) and 5 C.F.R. § 831.110. If OPM completely rescinds its reconsideration decision, the Board no longer retains jurisdiction over the appeal. See *Ramirez v. Office of Personnel Management*, 44 M.S.P.R. 259, 261 (1990).

The administrative judge found that "this matter [was] moot and [was] no longer within the appellate jurisdiction of the Board." Initial Decision at 2. Despite the appellant's argument to the contrary, this finding of lack of Board jurisdiction is consistent with Board precedent. See *Ramirez*, at 261; *Mavronikolas v. U.S. Postal Service*, 39 M.S.P.R. 442, 444 (1989); *Himmel v. Department of Justice*, 6 M.S.P.R. 484, 486 (1981) (the Board's jurisdiction is determined by the nature of an agency's action against a particular appellant at the time an appeal is filed with the Board, and an agency's unilateral modification of its adverse action after an appeal has been filed cannot divest the Board of jurisdiction unless the appellant consents to such divestiture, or unless the agency completely rescinds the action being appealed). OPM's reconsideration decision concerned only the issue of the timeliness of the appellant's application. By its April 3, 1991 letter, OPM decided to accept the application as timely

filed and, therefore, completely rescinded its reconsideration decision. See IAF, Tabs 10, 12.

OPM's action also moots the timeliness issue because the appellant's position prevailed. See *Garstkiewicz v. U.S. Postal Service*, 46 M.S.P.R. 689, 690-91 (1991). The appellant raises the issues of jurisdiction and mootness in the context of a future request for attorney fees. In *Garstkiewicz*, the Board found that the issue of attorney fees was not relevant to the mootness issue and that the appellant was not precluded from filing an attorney fees motion. See *id.* at 691.

When the appellant filed his petition for appeal, the Board had jurisdiction over the subject matter of the appeal, OPM's reconsideration decision. The fact that the Board lost jurisdiction over the petition for appeal when OPM rescinded its reconsideration decision does not preclude the Board from granting a motion for attorney fees under the appropriate circumstances. See, e.g., *Schneider v. Department of the Army*, 39 M.S.P.R. 462, 465 (1989); *Hodnick v. Federal Mediation & Conciliation Service*, 4 M.S.P.R. 371, 375 (1980) (an appellant may be a prevailing party for purposes of an attorney fee award if he obtained all or a significant part of the relief sought, even if a final decision has not been issued). We do not address the issue of whether the appellant is entitled to attorney fees because a motion for attorney fees must be timely filed with the regional office for adjudication after the issuance of this final decision. See 5 C.F.R. § 1201.37(a)(3).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

✓   
Robert E. Taylor  
Clerk of the Board

Washington, D.C.